Final Report of the California Senate Task Force on Family Equity

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The public's perception and faith in our judicial system is, to a large extent, a result of the manner in which family law matters are handled by that system. More citizens are directly involved in family law proceedings than in any other type of court case. It is estimated that one of every two marriages ends in divorce:\textsuperscript{1}

In 1985, for example, there were 42,502 marriage licenses issued by the County of Los Angeles and 42,050 divorce actions filed in Los Angeles County Superior Court.\textsuperscript{2}

\textsuperscript{1} R. SIDEL, WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA 17 (1986).
\textsuperscript{2} Garfield, When Marriages Fail, CALIFORNIA LAWYER 18, published by the State Bar of Cal., Vol. 7, No. 1 (Jan. 1987).
These cases have a profound and lasting impact on the lives of the women, men, and children involved. As one family law attorney pointed out, "...couples have invested time and money in each other, their children and their property." Also, that “[t]o dismantle their marriage they must dismember themselves. What they lose is a way of life, not merely an accustomed lifestyle.” The legal system’s treatment of family law matters also affects the future of our society because of the large numbers of children involved in these cases. Children’s economic and emotional stability during their growing years, their post-high school education and training, their impressions of, and belief in, the legal system are all affected by family law. Insensitivity or inequity in the handling of family law cases not only has a profound and lasting impact on the lives of the women, men, and children involved, but also affects the taxpayers who pay the price when delays in child support and spousal support enforcement result in the divorcing family being forced to rely on public assistance.

Judicial Training

Some attorneys assert that judges assigned to family law cases are not always knowledgeable or interested in family law: “[A]ttorneys complain of having to educate judges in the course of presenting their cases, and of facing judges who do not want to both read briefs or hear case law precedents.” It is, as one attorney put it, “like playing Russian roulette with my client’s future because we can be assigned to a judge who doesn’t have a clue about family law, hasn’t heard a case in 3 years, and has never dealt with a complicated pension case in his life.”

Litigants, both male and female, have complained of judicial insensitivity and bias regarding the legal, economic, and emotional issues in their cases. Judicial gender bias is now a recognized problem nationally including California. In 1986, the Judicial Council established a special committee on gender bias in the courts. Gender bias is of particular significance in family law cases, as a judge’s

3. Id.
insensitivity to the economic effects of their family law decisions can have a dramatic effect on a family’s economic future.\textsuperscript{7}

The high volume, complexity, and impact on people’s lives of family law cases require an educated, fair, and efficient family law judiciary. Continuing judicial education on family law, while not a panacea, is necessary to eliminate gender bias and sensitize judges to the economic consequences of their decisions. Judicial education is supported by at least some members of the judiciary. For example, one judge wrote the Task Force:

\ldots statutes should require that the [Center for Judicial Education and Research] CJER present a one-week educational program \ldots at the beginning of each year for those judges commencing the assignment. \ldots The program should be modeled along the lines of the present continuing judicial studies program. Although I recognize this is a costly proposal. \ldots I think the benefits they (judges) could receive from such education and the quality way they could thereafter handle their assignment more than merits this proposal.\textsuperscript{8}

And, as Professor Weitzman pointed out in \textit{The Divorce Revolution}, such education is effective:

When it became clear that awards that seemed fair in the abstract--awards that would “allow” a man to keep “enough” of his income and yet effect an “equal” division of family income and assets--actually served in these concrete cases to severely disadvantage women and children, the judges were more receptive to the notion that they should reconsider the consequences of their decisions and begin to think about what awards-setting standards might lead to more equitable results.\textsuperscript{9}

Of course, gender bias can be detrimental to men as well as to women; the important point is that education can assist judges in making more equitable decisions.

\textsuperscript{7} \textit{WEITZMAN, supra} note 4, at 395-400. \textit{See also Report of the New York Task Force on Women in the Courts, Office of Court Administration} 94, 121-22 (1986).

\textsuperscript{8} Letter from Justice Donald King to Judge Judith McConnell, Chair of the Senate Task Force on Family Equity (Sept. 26, 1986).

\textsuperscript{9} \textit{WEITZMAN, supra} note 4, at 396.
Judicial Resources and Working Conditions

In addition to education and training, judges and other court personnel who decide family law matters must also have adequate resources and staff to handle the vast number of cases and complex legal issues involved in these cases. Family law filings account for the single largest category of civil court filings in California courts. Statistics compiled by the California Judicial Council show that in 1984, family law filings comprised approximately 30 percent of the total civil filings statewide (164,252 family law filings; 65,711 probate and guardianship filings; 97,068 personal injury and property damage filings, and 112,349 "other" civil complaints).¹⁰ In large counties, the proportion of family law filings is even higher, estimated as high as 40 to 50 percent of all civil filings.¹¹ However, family law cases are assigned less than one-fifteenth of the judiciary's time—perhaps only one-tenth — and, thus, do not receive their share of judicial resources.¹²

In addition to heavy caseloads, family law judges are faced with cases that involve increasingly complex and diverse issues. Child support, spousal support, and child custody present the possibility of protracted use of court time and resources as such cases can be kept in court intermittently for more than a decade.

Judges and court personnel have complained of lack of adequate resources to handle the high volume and complexity of family law cases. As one judge pointed out in correspondence to the Task Force,

...there must be adequate judicial resources allocated to the assignment so that judges handling family law cases, which are already emotionally and physically difficult, are not required to virtually kill themselves while performing the assignment.¹³

Serious consideration should be given to increasing the number of judges assigned to hear family law matters. At a minimum, judicial resources should be commensurate with the high percentage of family law cases. This would reduce the caseload of those judges currently hearing family law matters.

¹¹. Id. at 13. See also letter from Justice Donald King to Honorable Judith McConnell (Sept. 26, 1986); Also see WEITZMAN, supra note 4, at 398.
¹². WEITZMAN, supra note 4, at 398. See also Justice Donald King, letter to Senate Task Force on Family Equity (Oct. 24, 1986).
¹³. Letter from Justice Donald King (Oct. 24, 1986).
Adequate support staff also must be provided to family law judges. Family courts need, and should be entitled to, the same level of support services currently provided to probate and juvenile courts, including investigators, counselors, accountants, and appraisers. Also, a state-administered court personnel system, with uniform statewide standards, might help reduce delays, inefficiencies and errors currently experienced in the processing and handling of family law matters.

DATA

In order to monitor the effects of divorce laws on the men, women and children in California, adequate statistical monitoring should be implemented. California citizens cannot wait for privately funded studies before addressing the needs of divorcing families and any legal system deficiencies in meeting those needs. Statistics which regularly should be gathered and published include:

- The average amount of child support orders and rates of compliance with those orders.
- The average amount and duration of spousal support awards.
- The number of “delay of sale of family home” awards and their average duration.
- The type of custody orders made.
- Data on conciliation courts’ mediation programs and services.

RECOMMENDATION #1

A more comprehensive training program in family law should be offered by the Judicial Council. In addition, other avenues should be explored to increase the attractiveness of and longevity in family law judicial assignments. Finally, methods of collecting and maintaining current data in family law cases should be explored.

IMPLEMENTATION

The following implementation strategies were proposed:

1. Judicial Education and Training. (Legislative Proposal #1) Legislation is proposed requiring the Judicial Council to establish a judicial education and training program on family law for all judges, including commissioners, referees, arbitrators, and mediators who regularly hear and decide family law matters. This training should include instruction on the effects of gender bias in family law
proceedings, and on the economic consequences of divorce for both women and men. This training should include a session on family law in any orientation for newly-appointed or elected judges, and a one-week, annual family law training session. To facilitate training, the feasibility of commencing family law assignments on January 1 of the year in which the assignment changes should be determined.


The Judicial Council should conduct a study on how to improve the working conditions for family law judges. Perhaps more judges need to be assigned to hear family law matters so that the amount of judicial time assigned to family law cases is commensurate with the high percentage of family law cases. As an alternative, family court judges’ salaries could be adjusted to reflect their higher caseload. Judges entering a full-time assignment as a family law judge should do so for a minimum period of time, perhaps two years. This would help insure an experienced judiciary. Moreover, family law judges could be provided paid “release” time for continued education and training, and family court judges’ salaries should be adjusted to reflect their higher caseload.


The attractiveness of family court assignments could be improved by providing more staff and resources for family law courts. The level of support staff for family law judges should be similar to that available to probate and juvenile court judges, and should include the services of investigators, counselors, accountants, appraisers, and additional personnel to assist in the implementation and enforcement of family law orders.


The Judicial Council should consider the adoption of a state-administered court personnel system, with statewide uniform standards of court administration, in order to reduce delays, inefficiencies and errors in the processing and handling of family law matters.


The Judicial Council should expand its Statscan project to include the gathering and compilation of statistical data on family law cases.
II

COMMUNITY PROPERTY

FINDINGS

Perhaps the major finding of Professor Weitzman’s *The Divorce Revolution* is that the most valuable asset acquired during most marriages is the husband’s (and occasionally the wife’s) career and enhanced earning capacity.¹ Yet these assets are not recognized as property and are therefore not divided upon divorce. Instead, the husband is often allowed to leave the marriage with these assets in their entirety.² This finding, in part, explains the disparate economic impact of divorce on men and women.

Professor Weitzman found that the average divorcing couple in California had relatively little in community assets.³ In fact the average divorcing couple can earn more in one year than the total value of the tangible assets that exist at the time of divorce.⁴ In 1978, the median family income of the divorced couples studied was $20,000 per year; yet the median value of community property owned was $10,900; an amount it would take the same couple between six and seven months to earn.⁵ In families with incomes over $30,000, community property was equal to or greater than annual family income; however, “even there, it takes the average family less than two years to earn as much as their property is worth.”⁶ Overall, “it takes the average divorced man about ten months to earn as much as the community’s net worth.”⁷

If the major investment of the couple during the marriage is in building the earning capacity or career assets of one spouse, and that spouse retains the entire investment after divorce, the spouses are left with very unequal shares of the community assets.⁸ Because it is generally the husband’s career in which the couple choose to invest, the

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² *Id.*
³ *Id.* at 55.
⁴ *Id.* at 59, 60.
⁵ *Id.* at 60.
⁶ *Id.*
⁷ *Id.*
omission of career assets and enhanced earning capacity from the
definition of community property has a discriminatory impact on
women. Most wives support (or “invest” in) their husband’s career and
earning potential; even in two-income or two-career families, it is
usually the husband’s career and earning potential that take priority.9
After the birth of a child, it is often the wife who takes a less demanding
or less than full-time job so that the husband can concentrate on his
career; she also is to stay home with a sick child.10 The decision to give
priority to the husband’s career is usually seen as a rational economic
choice, indeed a financial necessity, because most men earn significantly
more than most women. When such decisions are made, couples
generally decide to invest primarily in the career assets and earning
potential of one spouse, rather than in the career of both parties or in
other forms of property; they decide to have one spouse stay out of the
paid labor market and concentrate on home making and childrearing.
These career decisions are made jointly during marriage with the
expectation that both will share equally in the fruits of their endeavors.11
When couples divorce, however, one party, typically the wife, loses the
benefits of these joint decisions.12

Had the spouses used their time, resources, and income to purchase
real property during the marriage, both would share equally in the value
of that property at divorce. However, by instead investing in the career
and earning potential of one spouse, the other spouse loses the entire
investment at the time of divorce. The non-working spouse (usually the
wife) who has invested in her spouse’s career during marriage is
penalized for a mutual, joint decision made during marriage, while the
working spouse retains the full benefit of that joint decision.

FAM. L. Q. 41, 41-43 (1983); Minton, Valuing the Contribution of the Homemaker at
Trial, 1 Fairshare 7, 10 (Oct. 1981); Avner, Valuing Homemaker Work: An Alternative to
Quantification, 4 Fairshare 11, 12 (Jan. 1984). Courts throughout the country have
recognized that homemakers lose ground in the paid job market in order to enhance their
spouses’ career interests and pursuit of economic success. See, e.g., Parrott v. Parrott,
292 S.E.2d 182-84 (S.C.1982); Kerr v. Kerr, 610 P.2d 1380, 1382-83 (Utah 1980); LaRue
v. LaRue, 304 S.E.2d 312, 317; Steinke v. Steinke, 376 N.W.2d 839, 844 (Wis. 1985);
study indicated that 82 percent of women do all or most of the housework, despite the fact
that over half of women are in the paid labor force. See Bureau of Labor Statistics, U.S.
DEP’T OF LABOR, EMPLOYMENT IN PERSPECTIVE: WOMEN IN THE LABOR FORCE, Report 730
(1986). Another study showed that employed wives spend 26 hours a week on housework,
while their husbands spend 36 minutes. Cruver, Husbands and Housework: It’s Still an
Uneven Load, USA Today, Aug. 20, 1986, at 5D.
11. L. WEITZMAN, supra note 1, at 112.
12. See L. WEITZMAN, supra note 1, at 111, 112.
The failure to divide enhanced earning capacity may be particularly acute in shorter marriages. Couples generally spend the early years of marriage planning and building for their family's future economic security and stability. Some couples base their future economic security on investments in tangible property, such as real estate. However, early in marriage, many families invest in career assets or career potential (i.e., education, training, etc.) as a means of providing for their future economic security. Where the marriage is of shorter duration, the investment in a spouse's career potential has usually not begun to pay off at the time of divorce. Since the average length of marriage is 7.5 years, the family's major investment during the marriage often has not yet been transferred into tangible property. By permitting one spouse to leave the marriage with the entire earning potential, the other spouse may be denied the fruits of his or her investment during the marriage.

Enhanced Earning Capacity and Other Career Assets as Community Property

Career assets, including enhanced earning capacity, can be viewed as the product of investments in the human capital of the wage earning spouse. Those who object to the recognition of career assets and enhanced earning capacity as forms of property argue that these assets do not fit within the traditional view of property as something which has exchange value on the open market or is capable of sale, assignment, or transfer. However, as economist Philip Eden has noted,

> The enhanced earning capacity resulting from [education and training] is part of what economists call human capital. It is the capital value of a human being that is quite similar to the capital value of any machine or other piece of property. Both are

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13. Norton & Moorman, Current Trends in Marriage and Divorce Among American Women, 49 J. of Marriage and the Fam. 3.6 (1987). It is also worth noting recent and complete information on such questions as the average length of marriage, the age of divorcing spouses, and the number of minor children involved is not readily available in California. Previous to 1977, such data was collected and published by the California Department of Social Services. However, in 1977, as a result of legislation, California ceased participation in the Divorce Registration and data collection effort conducted by the federal government. The absence of California from this national data source makes it impossible to publish accurate "national" divorce statistics. In 1989 or 1990, the divorce data collection form used by states participating in the Divorce Registration Area effort will be revised to include information on the type of custody arrangement ordered. This might be an appropriate time for California to consider rejoining the national data collection effort and advocating for the registration form to include data on the amount of child and spousal support awarded.
measured in the same way, as the present value of the net income of the property over its useful life. . .

Human capital is just as real as any other form of capital. Indeed it is one of the most precious forms of property. . . . The ownership of capital, in any form it takes, is ownership of property. . . . Whether a given type of capital can be sold or transferred is of secondary importance. . . . Different forms and types of capital and property have varying degrees of salability, liquidity, or problems of realization. . . . These variations of form do not change their basic character as capital and property.14

A career that is built in the course of a marriage should be treated the same as real property accumulated during the marriage -- as community property subject to division -- because it is a product of the couple’s joint efforts and resources.15 In a leading decision on this issue, New York’s highest court recently recognized career assets as marital property, holding that:

the contributions of one spouse to the other’s profession or career . . . represent investments in the economic partnership of the marriage and that the product of the parties’ joint efforts, the professional license, should be considered marital property.16

In its 1986 decision in O’Brien, the New York Court of Appeal expressly rejected the argument that a career asset (such as a professional license) is not property:

[I]t is an overstatement to assert that a professional license could not be considered property even outside the context of [divorce]. A professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder, which may not be revoked without due process of law. . . . (cites omitted).17

14. L. Weitzman, supra note 1, at 112.
The characterization of human capital as an asset or property is commonly used in areas of law other than family law. For example, in wrongful death and tort actions, earning capacity has long been recognized as a valuable asset. If a husband dies in a wrongful death case, the primary measure of loss to the wife would be the loss of his human capital, i.e., the present value of his future earning capacity. In a divorce, the wife’s loss is only her portion of the present value of his enhanced earning capacity resulting from their mutual investment during the marriage. Human capital should be treated in the same manner, whether it be in the context of a divorce case or a wrongful death or personal injury case.

Earning Capacity Under Present California Law

The argument that investments in the human capital of one spouse are not community property makes little sense in California, where other types of intangible career assets (e.g., nonvested pensions, business goodwill) are already recognized by law as community property.

Until 1984, California led the country in recognizing career assets, such as retirement benefits, profit sharing plans, and goodwill, as community property. However, in 1984, the California Legislature enacted Civil Code section 4800.3, putting a sudden halt to its inclusion of further career assets as community property. Pursuant to section 4800.3, the “reimbursement method” of compensating a spouse for community contributions towards the education and training of the other spouse, which restricts a spouse’s entitlement to share this community asset, is “the exclusive remedy of the community or a party.”

Current California law is therefore one of the most restrictive laws in the country in its treatment of education, degrees, training and its resulting enhanced earning capacity. In some states enhanced earning capacity is expressly recognized as a community asset. In other states where earning capacity is not recognized as marital property, the courts are not bound by the “equal division of property” rule and can,

19. Id.
23. The Scoreboard, 9 Family Advocate, No. 2, 7-8 (Fall 1986). This article describes how appellate courts in 29 jurisdictions treat professional degrees and enhanced earning capacity.
therefore, award more than half of other marital property to compensate a contributing spouse.24

California’s treatment of earning capacity under Civil Code Section 4800.3 is discriminatory in two ways. First, this particular asset is arbitrarily treated differently from all other forms of community assets. If a spouse were to contribute towards the purchase of real estate, he or she would not be limited to recouping only the actual dollar investment. Instead, the spouse would share equally in the appreciated value of that property.

Similarly, any enhancement of separate or community property occurring during the marriage through the efforts, time, skills of one or both spouses is considered by law to be community property subject to division upon dissolution.25 The only asset not treated similarly is the most valuable asset acquired by California spouses—the earning power of one spouse acquired during the marriage. This can result in enrichment of, if not a windfall for, the spouse who fully retains that asset.

Second, Civil Code section 4800.3 discriminates against homemakers who, while not making actual dollar contributions towards their husbands’ careers and earning potential, make nonmonetary contributions via their homemaking, household management, childrearing and other social skills to maintain the family structure. The statute only permits reimbursement for “payments made . . . for education or training.”26

Thus, only actual monetary contributions toward a spouse’s enhanced earning capacity are reimbursable; nonmonetary contributions are ignored. This refusal to recognize nonmonetary homemaking contributions is contrary to the treatment of these types of contributions with respect to all other forms of community assets. With respect to all other community property assets, homemaking contributions are considered equal to monetary contributions towards the acquisition of those assets, and the homemaker shares equally in the full value of that asset.27

26. CAL. CIV. CODE § 4800.3(a) (emphasis added).
The inequitable nature of California's "reimbursement" method, compared to New York's "marital property" treatment, can be illustrated by referring to the facts of O'Brien. The trial court in O'Brien determined both the value of the wife's direct monetary contributions towards her husband's medical degree ($103,390), and the present value of the degree as marital property ($472,000). Under California's "reimbursement" method, Ms. O'Brien would only have been entitled to one-half of the $103,390. Under New York law, where the degree is marital property, she was entitled to a share of $472,000.

Valuation and Division Issues

Arguments that earning capacity cannot be valued and divided upon divorce are insupportable in the face of the characterization and valuation by California courts of other types of intangible career assets, such as pension rights, retirement benefits and business goodwill. Goodwill in a professional practice, which is community property in California, is in fact the earning potential of the professional maintaining the practice.28 For example, determining the present value of career assets, including future earning capacity, is no more difficult or confusing than the type of valuation now required for the valuation of other career assets such as nonvested pensions, or for determining "reimbursement" value under Civil Code section 4800.3. In fact, valuation under section 4800.3 may prove more difficult than determining the present value of enhanced earning capacity. Under section 4800.3, a spouse is required to prove "payments made" for contributions toward a spouse's education and training. The spouse who did not obtain a degree, but contributed toward her or his spouse's ability to earn a degree, therefore, needs receipts or proof of actual costs. However, many costs and contributions cannot be accounted for, such as typing of papers, babysitting costs, etc. It is unclear whether the spouse who did not obtain a degree has to forgo reimbursement for these types of "contributions", or can present expert testimony on the value of such contributions. Furthermore, the California Supreme Court's attempt to interpret section 4800.3 has led to confusion concerning which contributions are reimbursable and whether "compensation" means more than dollar for dollar reimbursement.29

29. See J.S. Shapiro, 'Whole'-ly Imprecise in California, FAMILY ADVOCATE, supra note 23, at 30, 32-34 (criticizing In re Marriage of Sullivan, 37 Cal.3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984)).
Professional accountants and appraisers regularly engage in valuation of human capital, including future earning capacity. In *O'Brien*, the New York trial court determined the lifetime value of the husband's medical license by considering evidence pertaining to the husband's age, entry into practice, residency specialty, and capitalizing the earning differential between a college graduate and the earnings of a general surgeon over the productive life expectancy of the husband (i.e., to age 65). The lifetime value of the husband's earning capacity as a result of the medical license was then discounted down to a "present value." The court stated that:

although fixing the present value of that enhanced earning capacity may present problems, the problems are not insurmountable. Certainly they are no more difficult than computing tort damages for wrongful death or diminished earning capacity resulting from injury and they differ only in degree from the problems presented when valuing a professional practice...something the courts have not hesitated to do.30

Arguments against characterizing earning capacity as community property based on difficulty of distribution of the asset are also unsupportable. California courts already employ various methods that could be used for distributing career assets, including installment payments, reservation of jurisdiction, etc. (The trial court in *O'Brien* ordered Mr. O'Brien to pay Mrs. O'Brien her share of the value of the medical degree in 11 annual installments). Thus, distribution and valuation problems do not justify denying a spouse his or her right and interest in an asset that she or he has invested in during the marriage.

Spousal Support in Lieu of Property is Inequitable

Some have argued that a spouse’s compensation for his or her investment in the other spouse’s earning capacity should be limited to spousal support awards. This is an inequitable and inadequate remedy. This method was expressly rejected by the New York court in *O'Brien*:

Limiting a working spouse to a [spousal support] award, either general or rehabilitative, not only is contrary to the economic partnership concept underlying the statute but also retains the uncertain and inequitable economic ties of dependence that the

Legislature sought to extinguish by equitable distribution. [Spousal support] is subject to termination upon the recipient’s remarriage and a working spouse may never receive adequate consideration for his or her contribution and may even be penalized for the decision to remarry if that is the only method of compensating the contribution. \( ^{31} \)

In many cases, the spouse who has helped the other spouse obtain enhanced earning potential may not qualify for spousal support because she or he has been working outside the home. Indeed, that spouse may have provided the sole or primary financial support for the family during the other spouse’s education or training. The contributing spouse may already be earning at a level commensurate with his or her reasonable needs, or even marital standard of living, and be deemed by the court to not need spousal support. Thus, the fact that the “contributing spouse” was working outside the home in order to permit the other spouse to pursue his or her career potential could defeat the need for spousal support; the “contributing spouse” would receive nothing on his or her investment.

Division of property is based on an entitlement -- a spouse’s right to share in the community assets -- not because that share is needed, but because the asset represents the capital product of the marital partnership. Using spousal support as a means of compensating a spouse for his or her contributions toward acquisition of marital assets is contrary to California law; in no other instance is a spouse required to receive his or her share of a community asset via spousal support.

Another argument made against defining enhanced earning capacity as community property is that the spouse awarded a share of the other’s earning capacity will be “double dipping” if she is also awarded spousal support based on consideration of that same earning capacity. This issue has been raised before with respect to division of other types of career assets such as pension rights. This concern is unfounded because property awards typically reduce the supported spouse’s “need” for support. Section 4801(c)(3) expressly requires the court to consider the “obligations and assets” of each spouse in determining whether to award support and, if so, how much. A property award of enhanced earning capacity would constitute an “asset.” In addition, the property award of enhanced earning capacity would reduce the supporting spouse’s “ability to pay.” In many cases, a property award of enhanced earning capacity will eliminate spousal support altogether. In the

\[ ^{31} \text{Id. at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.} \]
"O'Brien" case, Mrs. O'Brien received no spousal support award because of her property award. In California, courts already have experience in dividing career assets such as pensions and taking that property into consideration when determining the need for spousal support.

**Task Force Proposals**

The Task Force proposals pertaining to community property recognize that career assets, including enhanced earning capacity, acquired during the marriage are a valuable joint acquisition for California families. The intended goals of California's divorce law reforms of treating husbands and wives equally and treating marriage as a partnership of equals, cannot be realized unless "community property" is defined broadly to include these assets. As explained in "O'Brien",

few undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. Working spouses are often required to contribute substantial income as wage-earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license.32

The Task Force is, therefore, recommending two legislative proposals that address the need to include these assets in the division of community property at divorce.

**RECOMMENDATIONS FOR LEGISLATION**

1. That community property be broadly defined to include all forms of property and assets, tangible and intangible, including all career assets.

2. That enhanced earning capacity acquired during marriage be characterized as community property and subject to division upon dissolution.

32. *Id.* at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.
IMPLEMENTATION

1. Amend the California Civil Code definition of community property\textsuperscript{33} to include a statement of legislative intent that community property is intended to be broadly defined. In effect, this legislation would create a presumption that all forms of property and assets, tangible and intangible, acquired during marriage are to be considered community property. (Legislative Proposal #2)

2. Repeal California Civil Code section 4800.3 ("reimbursement" for contributions towards professional education and training), and replace it with a new statute defining enhanced earning capacity acquired during marriage as community property subject to division at divorce. Professional degrees, training and licenses are expressly included. Consideration of separate property contributions is expressly required. (Legislative Proposal #3)

\textsuperscript{33} \textit{Cal. Civ. Code} § 5110.
CHILD SUPPORT

FINDINGS

Inadequate child support award levels and noncompliance with support orders have been described as a national disgrace and scandal. It has led Congress to enact the Child Support Enforcement Amendments of 1984, Public Law 93-378. In addition, the California Legislature has enacted a number of child support bills during the last three years in an attempt to address problems with both the adequacy of and compliance with orders. Two of the most far reaching bills were the Agnos Child Support Standards Act of 1984, which established minimum child support award levels, and Senate Bill 1751 (Hart), which provided for mandatory wage assignments in all child support orders after January 1, 1987.

Much of the child support legislation has been based on the recognition that divorce is relegating millions of children to a diminished standard of living, and often even to a poverty level existence. Children residing with their mothers alone are almost five times as likely to be living below the poverty level as are children in two-parent families. In 1984, 3.1 million (45.7%) of the nation’s female-headed single-parent families were living below the poverty level, as compared to 194,000 (18%) of male-headed single-parent families and 9.4% of two-parent families.

Nor is this problem abating: census data reveals that the number of children living in single-parent households is steadily rising. In 1970, about 12% of the nation’s children lived in single-parent homes. By 1985, that figure had almost doubled: 23% of the nation’s 62.5 million children under the age of 18 were living with one parent, and 90 percent of the time that parent was the mother.

California especially has been impacted by the growth in female-headed households; in 1983 California had the highest number of such

3. Id.
households in the United States. Following a nation-wide trend, the number of female-headed households with children under age 18 in California has steadily increased from 565,000 in 1977 to 648,000 in 1986. Of these 648,000 families, 46% live on incomes below the poverty level.

Award Levels in California

In 1984, recognizing the inadequacy of child support awards, the California Legislature enacted the Agnos Child Support Standards Act establishing mandatory support guidelines. This Act was intended to raise the level of support awards. However, there is currently very little data available to measure the impact of the new law. Many observers provide anecdotal evidence of increases in support award levels (especially district attorneys representing AFDC recipients). Yet, the Task Force also found indications that the Agnos Act may not be fulfilling, in all cases, its promise of higher, equitable awards. For example, the Task Force received complaints from attorneys and parents that some courts are using the Agnos “mandatory minimum support level” as a cap or ceiling on child support awards. Furthermore, some data suggests that California child support awards remain inadequate. The January - March 1986 Quarterly Report of the Child Support Management System, submitted to the Governor by the California Department of Social Services, showed the average monthly child support payment collected by district attorneys’ offices to be $159.74 ($151.22 in AFDC cases; $167.69 in non-AFDC cases). This amount is less than the national median child support payment reported by the 1983 Census Survey of approximately $195 per month ($2,340

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4. W. DIXON, CHILD SUPPORT ENFORCEMENT: UNEQUAL PROTECTION UNDER THE LAW 9, (1985); see also, NEW YORK STATE COMMISSION ON CHILD SUPPORT, REPORT 5-6, Table B. (Oct. 1, 1985).
5. CALIFORNIA STATE CENSUS DATA CENTER, CURRENT POPULATION SURVEY, reported in Ann DuBay and Jack Hailey, Family Income in California 6-7 (California Senate Office of Research, March 1987).
8. CALIFORNIA DEPT OF SOCIAL SERVICES, JANUARY-MARCH QUARTERLY REPORT ON CHILD SUPPORT ENFORCEMENT, Table 13.
annually), and is only slightly higher than the U.S. poverty guideline of $150 per month per child.

**Compliance Problems/Lack of Awards**

In addition to low award levels, a large number of children in single-parent homes receive no child support either because a court-ordered award has not been obtained (or cannot be made) or because awards are not enforced. As of 1984, 42 percent of women living alone with children had no child support order. Of the 58 percent who did have court support orders and were due payments, only half (29 percent) received full payment. Of the remaining 29 percent entitled to receive support, 26 percent received only partial payment and 24 percent received absolutely no support payments. It should be noted that one-half of parents with current support orders do make their payments regularly and in full. However, the parents that do not meet their support obligation place an unfair and very expensive burden on the children, the custodial parent, and the taxpayer.

**Failure to Pay**

A correlation exists between a parent's failure to pay child support and the child's receipt of public assistance. Almost 90 percent of the children who are receiving Aid to Families with Dependent Children (AFDC) have a living parent absent from the home who is either paying insufficient child support or none at all. When the AFDC program was started in the 1930s, death of a parent was the major criterion for eligibility. In 1940, 42 percent of the AFDC caseload were families with a parent absent because of death. By 1979, families eligible for AFDC due to death of a parent accounted for only 2.2 percent of the total caseload. Thus, along with the custodial mother, the taxpayer has become a major provider for children of unwed or divorced parents.

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12. *Id.*
14. *Id.*
Fathers' financial inability to pay child support is not the major cause for families being forced onto welfare rolls. Census data shows that child support payments constitute only 13 percent of the average male's income in 1978, 1981, and 1984.  

Contrary to popular myth, studies show little relationship between a father's ability to pay child support and either the amount of support ordered or the rate of compliance with the order. As pointed out by Professor Weitzman:

Chamber's data from Michigan and our data from California indicate that most divorced fathers could comply with the court orders and still live quite well after doing so. Every study of men's ability to pay arrives at the same conclusion: the money is there. Indeed, there is normally enough to permit payment of significantly higher awards than are currently being made.

That financial inability to pay is not the primary cause of noncompliance is further evidenced by the fact that higher income fathers are just as likely not to meet their support obligation as low income fathers. Fathers earning $30,000 to $50,000 are as likely not to comply with court orders for child support as fathers with incomes under $10,000.

Moreover, research provides little or no support for the argument that noncompliance is related to visitation problems. While noncompliance with child support orders is prevalent, the great majority of fathers appear to be satisfied with visitation arrangements. For example,

[a] recent study of randomly selected noncustodial fathers with cases active in the North Carolina IV-D system found that the fathers were substantially satisfied with their visitation. Only 8 percent of AFDC fathers and 13 percent of non-AFDC fathers reported visitation problems. The fathers were specifically asked about complaints concerning frequency or duration of visits, or interference by the mother, and none of these complaints were reported to any significant extent.

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16. L. WEITZMAN, supra note 1, at 295.
17. Id. at 296. See also THE WHITE HOUSE: ADMINISTRATION ACTIVITIES ON ISSUES OF IMPORTANCE TO WOMEN, 25 (Feb. 15, 1983).
A study done in Travis County, Texas, where the county enforces visitation orders as well as support orders, found that:

in 1983 there were 13,808 complaints of support delinquency and only 746 complaints concerning denial of visitation. Furthermore, mothers appear to respond much more cooperatively after visitation complaints are filed than fathers do after support delinquency complaints are filed. [citation omitted] 19

Professor Weitzman also noted the lack of relationship between visitation problems and compliance with support orders:

Here again the empirical data directly contradict the assertion: there is no correlation between compliance and complaints about visitation. . . . [M]en with no visitation problems are just as likely not to pay child support as they are likely to pay. . . . [M]en who comply with child support awards are just as likely as those who do not comply to say they have some visitation problems. Canadian researchers similarly report the lack of a statistically significant relationship between visitation and compliance. 20

Regardless of why so many fathers have not complied with support orders, it is apparent that too many have not been required by the legal system to do so. 21

In the end the current legal system places the economic responsibility for children on their mothers and allows fathers the "freedom" to choose not to support their children. 22

19. Id.
20. L. WEITZMAN, supra note 1, at 297.
21. See generally D. CHAMBERS, MAKING FATHERS PAY (1979); L. WEITZMAN, supra note 1, at 298-307, 321-22. Some researchers have noted that among small groups of fathers studied (non-random samples) those who were heavily involved in childrearing had better payment rates. However, research is inconclusive as to whether a strong interest in the children leads to both large amounts of time spent with the children and a desire to insure payments are made, or if time spent with the children itself encourages payments.
22. L. WEITZMAN, supra note 1, at 321.
Enforcement in California

In California, enforcement of support is a major problem. At the end of 1986, delinquent child support payments in this state amounted to $1.25 billion. The actual debt is even higher as this figure includes only those cases on file with district attorneys’ offices. Cases in which the custodial parent is not aware of the district attorney’s enforcement services or has given up on trying to collect are not reflected in these figures. In 1984, the California district attorneys’ support enforcement units initiated actions in 1,002,917 cases (670,737 AFDC cases; 332,180 non-AFDC cases). This number constituted the largest caseload of any state. Caseloads in the next two highest states were significantly less in volume. New York had 646,314 and Michigan had 630,595 cases. While many California district attorneys are deserving of compliment for handling such high caseloads, this effort must be enhanced to meet the enforcement needs of California’s children.

The Task Force received testimony, oral and written, critical of the California support enforcement effort. The testimony raised issues concerning rudeness and delay in the system, and echoed a concern that widely disparate attitudes and practices are displayed by public enforcement agencies and judges from county to county. In addition, it became painfully clear that the district attorney support enforcement units, no matter how dedicated their efforts, lack adequate staff and resources to handle the overwhelming numbers of child support cases.

At the Task Force public hearing much concern was also voiced over testimony that California is forty-seventh in the nation in child support collections. This comparison is based on figures disseminated by the Federal Office of Child Support Enforcement (OCSE) and has been attacked by district attorneys as misleading. Although some witnesses believed this study related to total collections, in fact, the figure is a ratio of collections on welfare cases to total welfare grants. In collections on welfare cases, California has stood consistently as number one in the country. However, because California’s AFDC grant

25. Id.
26. See, e.g., Public Hearing Record, supra note 7, Testimony of Stephanie Paul; Susan Spier on behalf of Single Parents United ‘N’ Kids (SPUNK); Gloria Allred, Esq.
27. See Public Hearing Record, supra note 7, Testimony of Susan Spier on behalf of SPUNK; Letter from Susan Spier to Michael E. Barber (Nov. 3, 1986.).
level is higher than that of most other states, the ratio of its collections on AFDC cases to the total amount of AFDC grants is lower than that of most other states. Also, California has been third in the nation in a state by state comparison of collections on non-welfare cases. In relation to our total population, California’s collections are significantly larger in proportion to national collections than is California’s population relative to the national population. The OCSE publications and statistics focus on welfare recoupment, which is merely one facet of child support enforcement, one which has recently been deemphasized by the federal government. In fact the 1984 Child Support Enforcement Amendments recognize that a significant method of reducing poverty is to concentrate on the collection of support in non-welfare cases, thereby preventing families from going on welfare.

Proposals

The Task Force made a number of recommendations for legislation, research and administrative changes which are detailed in the following sections. These proposals address the continuing need for child support awards to be sufficient to adequately cover the cost of raising children and to enhance the enforcement capability of district attorneys’ offices.

RECOMMENDATIONS FOR LEGISLATION

1. CHILD SUPPORT TO AGE 21

All parents should be legally obligated to support their otherwise unemancipated children to age 21. This would facilitate children’s pursuit of college education or other training, and guarantee that in divorced families both parents equally share the burden of supporting 18 to 21 year old children as would occur if the parents were married.

IMPLEMENTATION

Amend Civil Code sections 196.5, 4700, and 4700.9 to require all parents to support their unemancipated children to age 21. (Legislative Proposal #6)

DISCUSSION

Current law, by terminating child support when a child reaches age 18 or graduates from high school, exacerbates the impoverishment of children by divorce and has a negative impact on children's pursuit of higher education or advanced training. In turn, the lack of education has adverse consequences on the children's future employment opportunities. Many 18 to 21 year-olds continue to live at home or receive financial assistance from their parents while attending college, vocational training, or working at low-paying jobs. According to recent Census Bureau studies,

among the 18-24-year-old crowd, 60 percent of men and 48 percent of women lived at home or in college dorms in 1985. That's up from 54 percent of men and 43 percent of women in 1980 and 52 percent and 41 percent in 1970.

In the two-parent "intact" family, the responsibility of supporting these young adults is shared equally by both parents. In the divorced or single-parent family, the responsibility is unequally borne entirely by one parent, usually the custodial mother, because the noncustodial parent's legal obligation of child support has terminated when the child reaches age 18. This unequal burden of supporting 18 to 21 year-old children comes at a time when the divorced or single mother is least able to afford the additional support costs. Her ability to seek higher-paid employment is diminishing because of her age, and spousal support, if awarded, has generally ended by the time the child reaches age 18.

Other minor siblings for whom support is being paid are also affected by the termination of support for the 18 year-old. The child support awarded for the minor children must be spread to cover the additional sibling for whom support has ended. This situation is exacerbated by the fact that the Agnos Child Support Standards Act support awards are based on the number of minor children in the household (rather than, for example, upon the household's needs).

31. CAL. CIV. CODE § 196.5.
Failure to provide support at the time children are to enter college has a detrimental effect on the children's pursuit and attainment of a college education or advanced training. The results of the very limited research done in this area raise concerns about the willingness of fathers to pay college expenses. In a 10-year follow-up study of divorced families in Marin County, Dr. Judith Wallerstein and Shauna Corbin found that the majority of the mostly middle-class and affluent fathers she studied were refusing to financially assist their children in obtaining college educations. The data showed that:

fathers who had maintained contact with their children over the decade, who had supported them with regularity and who were well able to continue supporting them financially, failed to do so at the time when their youngsters' economic and educational preparation for adulthood was at stake. These changes in parental support have lifelong ramifying implications for children in divorced families.35

This study revealed "an unexpected finding of a downward economic and social trend and disadvantaging of a significant number of these young people from middle-class families as they stand on the threshold of adulthood."36 The fathers studied were financially able to support their children in college: fifty-three percent of the fathers were professionals and another twenty-seven percent were businessmen in executive positions or owners of small businesses.

[I]t is difficult to explain the reluctance of economically stable, even affluent, fathers who remained in regular contact with their youngsters, who valued education and economic success, and who were no longer in active conflict with their former wives, to support and encourage high aspirations in their sons and daughters. Few men claimed inability to pay; very few expressed disinterest in their children. Most of these fathers indicated that they had met their legal obligations over many years and that their responsibilities had ended. They did not confront the issue that many of these young people, by virtue of their social class and the mores of their community, would have been substantially supported through their college years as a matter of course had the marriage remained intact.37

35. Id.
36. Id. at 109-10.
37. Id. at 125.
Currently, the only means by which a custodial parent can guarantee that the noncustodial parent will financially contribute towards a child's college education is by a written voluntary agreement. Many divorcing women "bargain away" spousal support and other property rights in exchange for the father's written agreement to assist with college expenses.\(^{38}\) Such bargaining may serve to further lower the mother and child's standard of living during the child's minority.

The Task Force is recommending that the age to which parents owe a legal duty of support to their children be raised from age 18 to age 21. The recommendation provides the fairest and simplest method for protecting all children in a non-discriminatory manner. The Task Force's proposal treats all parents and children equally. Divorced, married, and unwed parents would all have the same legal obligation to support their unemancipated children to age 21. The Task Force proposal guarantees that all unemancipated children, whether from poor or wealthy families, college-educated or not, would be entitled to the same right of support. And, the Task Force proposal promotes the state's interest in guaranteeing that children of divorce are treated similarly to children in nuclear, two-parent families:

In allowing for divorce, the State undertakes to protect its victims... A number of courts adopt the policy that a child should not suffer because his parents are divorced. The child of divorced parents should be in no worse position than a child from an unbroken home whose parents could be expected to supply a college education... Parents, when deprived of the custody of their children, very often refuse to do for such children what natural instinct would ordinarily prompt them to do... In most cases the father, who is the one who holds the purse strings, and whose earning capacity is greater than that of the mother, is the one who is able to give the minor a proper education.\(^{39}\)

The Task Force proposal does not directly address the issue of college expenses. The proposal merely extends the subject matter jurisdiction of the court to order support to age 21. However, by extending the court's jurisdiction to age 21, the court would have the discretionary power to award support sufficient to cover college needs on a case-by-case basis.

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38. L. Weitzman, supra note 1, at 280-81.
The Task Force proposal also extends the parental legal right of custody and control over a child to whom support is owed. Thus, a child between the ages of 18 and 21 years must submit to parental control and custody if he or she is to be entitled to support. There is some concern that the Task Force proposal could affect an 18-to-21 year old’s legal rights as an adult, or parental liability for the acts of the 18-to-21 year old. However, the Task Force proposal raises the age of “minority” to age 21 for child support purposes only. Section (b) of the Task Force proposal clearly states that the definition of “minor” or “child” as one less than twenty-one years of age, only applies with respect to Chapter 1 of Title 1 of the Civil Code (sections 196, et. seq.). Thus, the Task Force proposal does not and is not intended to change the age of majority for any other purpose but child support. An 18-to-21 year old’s legal rights and responsibilities as an adult, such as the right to contract, are unaffected by the Task Force proposal. In addition, parental liability for acts of an 18-to-21 year old adult are not extended or affected. The Legislature may wish to clarify the intention not to extend parental liability or interfere with an 18-to-21 year old’s legal rights and responsibilities by adding an express provision to the proposed legislation.

The Task Force proposal is simple to enforce and does not create additional difficulties for district attorneys’ support enforcement units. Experience in other states shows that laws providing child support only if a child is attending college can result in substantial litigation over such issues as whether the child is a full or part-time student, whether the child should be attending a private or public college, or whether the family “background” justifies the child attending college. Whether or not the 18-to-21 year old child had been emancipated would be the only issue open to litigation under the Task Force proposal.

The Task Force proposal is retroactive. All existing child support orders would continue in effect until the child reaches age 21 or is emancipated as defined within the proposed statute. Retroactivity is consistent with the parens patriae power of the state to protect children’s best interests; since child support orders can always be modified, retroactivity does not violate constitutional due process requirements.

The Task Force proposal is consistent with the national trend recognizing that young people who reach age 18 should not, for all purposes, be considered adults. For example, the federal government recently raised the age for buying and serving alcoholic beverages to age
21. Furthermore, Indiana, Missouri, New York, and Oregon require parents to support their children until age 21, and Iowa requires child support to age 22 for children regularly attending school.

2. HARDSHIP DEDUCTION UNDER AGNOS CHILD SUPPORT GUIDELINES

In the determination of child support awards, the amount a supporting parent may deduct for the children with whom she/he resides should not be more than the amount paid to the children subject to the support order being determined.

IMPLEMENTATION

1. Amend California Civil Code section 4725(b) to provide for uniformity in application of the hardship deductions for “minimum basic living expenses” of dependent natural or adopted children residing with the obligor-parent. (Legislative Proposal #7).

2. Amend California Civil Code section 4721(c)(5) to permit deduction for voluntary child support payments for natural or adopted children not the subject of a court order, provided however that said deduction does not exceed the applicable county support schedule amounts. (Legislative Proposal #7).

DISCUSSION

The Agnos Child Support Standards Act permits courts to deviate from the formula utilized to calculate the actual monthly child support payment and reduce the amount of the child support obligation in several ways. Among them are:

1. Deductions for Prior Orders. Section 4721(c)(5) allows the obligor-parent to reduce his or her gross monthly income by the

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40. 23 U.S.C. § 158 (Supp. 1989) (five percent of federal highway funds shall be withheld from any state in which it is lawful for a person less than twenty-one years of age to purchase or publicly possess any alcoholic beverage).

41. IND. CODE § 31-1-11.5-12(d) (Supp. 1989); MO. ANN. STAT. § 452.340 (Vernon 1990) (child support obligation continues until the child reaches his or her twenty-second birthday, if the child is enrolled in an institution of vocation or higher education following high school graduation); NEW YORK DOM. REL. LAW §§32(3) (McKinney Supp. 1990); OR. REV. STAT. § 107.108(4) (child attending school); IOWA CODE ANNOT. § 598.1(2) (Supp. 1989) (child in school).

42. CAL. CIV. CODE § 4270 (West 1984).
amount of child or spousal support being paid pursuant to a court order for children of a prior marriage or relationship (i.e., "first family" deduction).

2. Hardship Deductions. Section 4725(b) permits the court to reduce the amount of a child support award for the "first family" calculated under Section 4722 by permitting the obligor to deduct "basic minimum living expenses" of dependent children (i.e., "second family" deduction).

The basis for enacting the Agnos Child Support Standards Act was to limit judicial discretion in setting child support awards. The Legislature found that courts were not using their discretion to insist on adequate child support awards. However, the discretionary "hardship deduction" under section 4725(b) is developing into another loophole for lowering child support awards. Legislation is needed to narrow this loophole by limiting the amounts and types of expenses allowable for hardship deductions under section 4725(b).

On its face, the "hardship deduction" (Civil Code section 4725(b)) discriminates against children of prior or "first" relationships. In determining the amount of the "hardship deduction," the court is not required to consider the income of the other parent with whom the children reside (i.e., the second spouse's income). However, in determining the obligor-parent's support obligation for children of a prior marriage or relationship, the Agnos formula requires consideration of both parents' income. Thus, while the obligor-parent's support obligation to "first family" children is reduced because of the custodial parent's income, no similar treatment of the second spouse's income is applied in calculating the "hardship deduction".

The Task Force believed that no "hardship deduction" should be permitted for children residing with the obligor-parent. As a matter of public policy, the Task Force considered that the support rights and needs of children of a prior marriage or relationship (i.e., "first family") must receive priority over the support of children of subsequent relationships who are residing with the obligor-parent. This public policy encourages and requires an obligor-parent to assume responsibility for his or her existing children and obligations before taking on new and additional responsibilities. The issue is not whether children of different relationships are entitled to equal support from the obligor-parent. Instead, this policy recognizes that the support of second families is undertaken with prior knowledge of existing obligations to the children of the obligor-parent's previous marriage or
relationship. Thus, the Task Force believes that children of a prior family or relationship should not have to suffer the consequences of the obligor-parent's unilateral decision to assume new family responsibilities.

While the Task Force believed the "hardship deduction" should be eliminated altogether, it realized that this may not be politically feasible at the current time. Therefore, the Task Force is recommending legislation that strictly defines the "hardship deduction" and provides for uniformity in application. The primary concern addressed by the Task Force's proposed legislation centers around the proper interpretation and degree of discretion allowed with respect to deductions for a hardship necessary to meet the "minimum basic living expenses of either parent's dependent minor children from other marriages or relationships," (Civil Code section 4725(b)). This section of the law raises two issues the legislation seeks to address.

The first question is what child or children from other marriages or relationships should be allowed as a "hardship" deduction. Currently, children from other marriages or relationships supported pursuant to a support order are taken care of by a deduction from gross income under Civil Code section 4721(c)(5). Payments made for dependents not the subject of an order may be treated as a "hardship deduction," in consideration of children in the "second family." However, there may be children not part of the second family who are not the subject of an order to whom payments are made voluntarily. The support of these children, who most likely do not reside with the obligor parent but are from a previous marriage or relationship, may also under current law be treated as a "hardship" by the courts. The proposed legislation provides that if child support is actually paid for natural or adopted children not the subject of an order (voluntary payments), such children may be taken into consideration by an additional deduction from gross income rather than by a "hardship deduction," in the same manner as payments through a support order. A limitation on the extent of credit for such voluntary payments is included, capping the deduction at the applicable county support schedule amount. This change would continue to provide for all children of the obligated parent not living in such parent's home and not subject to a support order. The proposed legislation further provides that hardship deductions would apply—as they were intended to apply—to natural or adoptive children of the obligated parent only if they reside with such parent.

The most pressing issue involves the amount of the deduction to be allowed under section 4725(b), relating to the hardship deduction to meet the "minimum basic living expenses" of resident children. As
illustrated in Table 1, infra p. 126, a great degree of variance in the amount of the deduction allowed by courts exists in direct contravention to the stated goal of the statute (Civil Code section 4720(a), (b), and (d)) to provide for uniformity in the determination of child support awards among similarly situated families. The degree of variance in implementing this deduction may best be expressed by a simple example. Suppose a support order must be made in the following circumstances: the custodial parent (mother) has two children in common with the noncustodial parent (father); the custodial parent has no income and the noncustodial parent has a net income of $1,000; and the noncustodial parent has three additional children of his own living with him. The following methods have been used to determine the proper deduction for hardship depending on the county where the matter is heard. The result of using the varying methods is lack of uniformity, and, in some cases inadequate and inequitable child support awards. The outcome achieved under option 4 is that sought by the proposed legislation.

Discussion of Options

1. No Deduction: If no "hardship" were found, the noncustodial parent would pay 27% of his net income to support his two children outside of the home. His child support obligation would be $297.00 or $148.50 per child pursuant to the Agnos mandatory minimum.

2. Single Pot Theory: This option presumes the obligated parent should pay the same amount for each child based upon the total number of children and the requisite percentage of his income used for that number of children under Civil Code section 4722(b)(1). In this case the noncustodial parent has five children and 44% of his income would be spent on them; 44% of $1,100 is $484 divided by five, or $96.80 per child. Since two children are the subject of the order to be made, the noncustodial parent would pay two times $96.80 or $193.60 as a child support order. Working backwards, however, under the Agnos Child Support Standards Act, if the noncustodial parent paid $193.60 for children in this example, he would effectively have been allowed a hardship deduction from income in the amount of $382.96 or $127.65 per child for the resident children.
3. Welfare Grant Deduction: In some jurisdictions "minimum basic living expenses" has been interpreted as an amount equal to a welfare grant for the number of children subject to the hardship deduction. Under this option, the noncustodial parent's income would be reduced by a grant for three children as follows: $1,100 - $587 = $513. Then, the noncustodial parent would, under the Act, be required to spend 27% of the remainder on the children subject to the order (27% of $513 is $138.51 or $69.26 per child.) Yet $587, or $196.67 per child, would have been reserved for children residing in the home.

4. Deduction May Not Exceed Minimum Award: This option would provide uniformity in applying the hardship allowances. In the example given above, the maximum deduction may be computed by a simple mathematical formula (see Appendix A). The result is a deduction of $105.69 per child in the home. The child support order is $105.69 for each child subject to the order. If under this option, the court found that a lesser deduction would be allowed for children in the home—presumably because a smaller hardship was found—then the child support order for children not residing in the home would be higher. In no event, however, would children in this home get a greater amount of the noncustodial parent's income reserved for them than would the children subject to the order.

As may be readily seen, options 1, 2, and 3 allow children of the same parent to be provided with significantly different levels of support. Option 3, now being used in San Francisco, reserves almost three times as much for each child at home as is awarded to the children subject to the order under the Agnos Child Support Standards Act. On the other hand, option 4 equalizes the amount reserved for children of the same parent whether or not they live in the same home. The Task Force is proposing an amendment to section 4725(b) that would lend itself to the more equitable result.
Table I

<table>
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<th>Options</th>
<th>Child Support Award Based on Net Income</th>
<th>Allowable Deduction for Hardship</th>
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*Children from first marriage
**Children from second marriage

3. PUBLIC EDUCATION AND AWARENESS ABOUT CHILD SUPPORT RIGHTS AND RESPONSIBILITIES

Accurate information describing child and spousal support, custody and visitation rights, and the responsibilities, legal procedures, and processes of collection and payment of support must be made available to all parents involved in a support proceeding.

IMPLEMENTATION

Amend California Welfare and Institutions Code section 11475.1, which requires the State Department of Social Services to publish a booklet for parents regarding their support rights and responsibilities, to require the Judicial Council to review the booklet and to require that a copy of the booklet be served on all parties involved in a support proceeding. (Legislative Proposal #8)

DISCUSSION

It is apparent that parents continue to be confused about their child support, spousal support, and custody and visitation rights and obligations. Some parents do not take advantage of new laws that would benefit their children. Susan Speir, President of SPUNK, explains that custodial mothers do not make use of the simplified procedure to update child support orders, pursuant to California Civil Code section 4700.1, because of fear of a contested custody battle.

43. GOVERNOR'S COMMISSION ON CHILD SUPPORT DEVELOPMENT AND ENFORCEMENT, FINAL REPORT 17-18 (Jan. 1985).
44. Letter from Susan Spier, SPUNK, to Michael E. Barber (Nov. 3, 1986).
One Task Force member, who counsels divorcing fathers, noted that when he explained California’s new mandatory wage assignment law (Civil Code Section 4701), many parents asked “Where could they sign up?” These parents, when shown the benefits of the new law (e.g., not having to deal directly with the custodial parent, having payments made on time, not having to subject new wives to the child support issue) were enthusiastic.45

The Task Force believes that an informed parent will be a more responsible parent. Section 11475.5 of the Welfare and Institutions Code requires the State Department of Social Services (SDSS) to prepare a booklet for parents describing the procedures and processes for the collection and payment of child and spousal support. Currently, the SDSS is required to distribute the booklet only to AFDC recipients and to District Attorneys’ offices. The Task Force believes that this booklet must receive the widest distribution possible.

To guarantee that every parent involved in a support proceeding receives a copy of this booklet, the Task Force recommends that section 11475.5 of the Welfare and Institutions Code be amended to require that: (1) the State Department of Social Services provide the booklets to all clerks of the Superior Court; (2) that the court clerks provide two copies of the booklet to all petitioners and plaintiffs in any child support action, and (3) that the petitioner or plaintiff be required to serve a copy of the booklet on the other parent or party involved in the case. In addition, the Task Force recommends that Welfare and Institutions Code section 11475.1 be amended to require that the Judicial Council review the booklet for accuracy.

The Task Force proposal will help guarantee that all parents involved in support actions have access to accurate information. As confusion, misinformation, and frustration are alleviated, parents will be encouraged to make proper use of all available remedies.

4. PRO SE MODIFICATION — UPDATING SUPPORT ORDERS

Child support orders need to be routinely updated to keep pace with inflation, to meet the increasing costs of raising growing children, and to guarantee uniformity of support orders.

45. See also L. WEITZMAN, supra note 1, at 304-05.
IMPLEMENTATION

Amend California Civil Code section 4700.1 to permit modifications up to applicable state or county guidelines, to provide equal access for updating support orders on behalf of AFDC recipients, and to clarify application of the modification provisions. (Legislative Proposal #9)

DISCUSSION

While public attention has focused on the poverty of women and children caused by nonenforcement of support awards, nonenforcement is only part of the problem. For some families, initially low support awards are not adjusted throughout the child’s life. Women and children may be forced into poverty because support awards do not keep pace with inflation or the escalating costs of meeting the needs of growing children. The effect of inflation on support awards erodes the purchasing power of the original dollar amount. Nor do stagnant awards reflect the paying parent’s increase in wages, when those occur, which makes his or her support obligation a smaller, decreasing percentage of earnings.

Professor Weitzman found that “less than 10 percent of the support awards included a cost of living escalator or other form of anti-inflationary adjustment.”\(^{46}\) Dr. Judith Wallerstein, in her ten-year follow-up study of largely white, middle-class divorced families from Marin County, found that child support awards “were generally not revised upward as the . . . youngster entered adolescence”\(^{47}\) and that “most of the 30 percent of families who initiated litigation regarding money did so to request enforced payment of delinquent child support. Very few requested modification upward.”\(^{48}\)

As pointed out by Dr. Wallerstein’s study, failure to update support orders affects children psychologically, as well as economically:

One attorney with a six-figure income paid $150 monthly for child support over the years, an amount that had been set when he was a young man recently graduated from law school and his only daughter was three years old. He continued his payments regularly throughout the entire ten years following the divorce.

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46. Id. at 281.
48. Id. at 116-17.
When the ninth year postdivorce approached, he voluntarily offered to increase his child support by $50, to a total of $200 per month. His adolescent daughter sarcastically referred to this extra money as “a tip,” telling us that her father withheld the additional $50 if she displeased him by being late for their visits.49

In 1985, the California Legislature enacted the Agnos Child Support Standards Act50 for the purpose of providing for more adequate and equitable child support awards. However, the gains in adequacy and equity from using a support formula to establish initial support orders are undermined if the initial orders are not routinely updated.

Without a simplified, automatic method for updating support orders, the burden is on the custodial parent to return to court on behalf of the child and petition for a modification of support based on “changed circumstances.” This traditional modification process presents many difficulties for the custodial parent including lack of funds for legal expenses, time lost from work, emotional costs of returning to court, and possible retaliation by the noncustodial parent (e.g., withholding child support or requesting a change of custody).51 The custodial parent is left with no real choice: she or he either absorbs the impact of the deteriorating purchasing power of the initial award, or incurs the substantial legal expenses of seeking upward modification with the attendant risks of a contested custody battle or loss of custody.

If support orders are not routinely updated, the goal of support guidelines to provide uniformity of support orders is destroyed. Similarly situated families will, once again, have different support orders simply because of the date of the initial order. Nationally, child support experts have developed two methods for routine updating of support awards to keep pace with inflation and the increased needs of growing children: (1) automatic escalation clauses (COLA’s) based on fluctuations in the state or national Consumer Price Index;52 or (2) reapplication of mandatory support guidelines.53 Both methods seek to guarantee that the “buying power” of the amount originally determined as necessary to meet the child’s needs will remain available.

49. Id. at 117.
50. CAL. CIV. CODE § 4720 (West 1980).
51. Letter from Susan Speir, SPUNK, to Task Force Member Mike E. Barber (Nov. 3, 1986).
52. See, e.g., Minn. Stat. § 518.641.
Neither of these methods have been implemented in California. Instead, in 1984, California enacted Civil Code section 4700.1, which provides a simplified, semi-automatic procedure for increasing child support orders up to 10 percent a year. This method is somewhat similar to automatic cost-of-living escalation clauses: section 4700.1 presumes a need for increased support based on inflation and the higher costs of growing children. The custodial parent is therefore not required to prove "changed circumstances" in order to obtain an increase. Section 4700.1 also avoids the legal costs of updating awards by precluding attorney participation in these proceedings. Section 4700.1 addresses the needs of the obligor-parent by inclusion of a simplified procedure for reducing support awards where the obligor-parent's economic situation deteriorates (e.g., loss of job).

The Task Force found that the updating procedure pursuant to section 4700.1 is not being utilized by most parents. The Task Force therefore recommends that Civil Code section 4700.1 be amended to facilitate and expand its use.

As enacted, subdivision (d) of section 4700.1 does not make clear that the 10 percent modification provision applies only to increases, or upward modifications. It is therefore possible for a court to lower a support award by up to 10 percent without proof of changed circumstances. Therefore, custodial parents are reluctant to utilize Section 4700.1 because they risk a reduced support order in the event of a challenge by the other parent. Thus, the Task Force is recommending that section 4700.1(d) be clarified to state that the 10 percent modification provision only applies to increases in support.

Under the Task Force proposal, section 4700.1 would also be available to conform support awards to state or county child support guidelines where conformity to the guidelines would increase the award by an amount greater than 10%. In In re Marriage of Moore, the court held that 10 percent was a cap and, therefore, a support order could not be modified up to the applicable guideline in an action brought pursuant to section 4700.1. Permitting support orders to be brought into compliance with applicable guidelines through a simplified procedure, without proof of "changed circumstances" or use of attorneys, promotes the purpose of guidelines, to wit, equity and uniformity of support orders. Since the guidelines establish per se the state's determination of

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54. Susan Speir, Letter to Mike E. Barber, supra note 44; see also Mike E. Barber, Esq., (unpublished memorandum to Senate Task Force on Family Equity) (Aug. 5, 1986).

55. This "10 percent provision" is based on a presumption that automatic increases in support awards are necessitated by inflation and the increased needs of growing children. There is no basis for presuming an automatic decreased support need.
the level of support necessary for raising children, all children should be entitled to that support level regardless of the date of the initial order.

Finally, the Task Force believes that AFDC recipients (who have assigned their support rights to the state) are entitled to equal treatment with respect to updating support orders. The best interests of the child and the state are promoted by routine updating of these support orders. Updating of AFDC recipients’ support orders would increase reimbursement to the state, and would make it more feasible for custodial parents and children to go off AFDC. Currently, attorneys are not allowed to participate in section 4700.1 proceedings. The AFDC recipient has assigned the rights to child support over to the state and therefore cannot represent himself/herself in a section 4700.1 proceeding. Thus, the Task Force is recommending clarification that nonattorney personnel of district attorney support enforcement units are permitted to utilize section 4700.1 to update support orders.\(^{56}\)

5. ESTABLISHMENT OF PATERNITY

Meeting the increased volume of paternity cases requires special funding for county district attorney support enforcement units.

IMPLEMENTATION

Amend section 15200 of the Welfare and Institutions Code to require the State to reimburse counties for certain costs of establishing the paternity of children born out of wedlock. Specifically, the Task Force proposal would limit the county share of these costs to 5 percent and require that the state make up the difference between the federal share and 95 percent of the total cost. (Legislative Proposal #10).

DISCUSSION

A recommendation pertaining to the funding of district attorney efforts to establish paternity was made by the Governor’s Commission on Child Support Development and Enforcement.\(^{57}\) The Task Force endorses this recommendation (which has not yet been implemented) in order to provide greater incentive to counties to pursue the establishment

\(^{56}\) Use of nonattorney personnel is consistent with the representation of corporations or other entities in proceedings that exclude attorneys, such as small claims court.

\(^{57}\) CALIFORNIA COMMISSION ON CHILD SUPPORT DEVELOPMENT AND ENFORCEMENT, **Final Report** 69 (1985).
of paternity, thereby increasing child support collections. The Commission’s findings are summarized below: 58

1. Between 1970 and 1981, the number of babies born in California outside of marriage rose from 45,593 (or 12.6% of all live births) to 91,526 (or 21.8% of all live births). Where paternity is not established for children born out of wedlock, the burden of providing for children falls entirely upon the mother or the State and the taxpayer.

2. If an individual is ordered to pay child support it does not guarantee he or she will pay. But, if the person is never ordered to pay, there is not even the possibility for payment. Many out-of-wedlock fathers will and do admit paternity. However, their willingness to do so decreases significantly after the birth of the child. The father often loses contact with the mother and has no opportunity to develop a family relationship. Also, lulled into a false sense of security, the father may develop a family or at least another relationship which makes the ultimate payment of child support to the first child that much more difficult. Thus, it is in the best interests of both the father and the child to encourage the establishment of paternity in order to provide a basis for future visitation and/or custody rights as well as to secure financial support . . . 59

3. The Governor’s Commission also emphasized that in addition to child support, other sources of income for the child depended upon a determination of paternity. These sources include social security, disability payments, and other types of “derivative rights.” 60 Currently, the focus of county enforcement agencies is on cases which will most quickly result necessarily in a collection which will provide income to the child as well as incentive grants to the county. 61 In comparison, “the establishment of paternity . . . is a costly and time-consuming process.” 62 Therefore, county enforcement efforts cannot be expected to pick up a large portion of the cost of paternity establishment. Because the federal government currently reimburses the counties for approximately 70 percent of their child support administrative costs, raising the reimbursement rate to 95 percent for costs associated with the

58. Id. at 69-75.
59. Id. at 69.
60. Id. at 70.
61. Id. at 74.
62. Id.
establishment of paternity would result in a shift of 25% of the cost to the state. 63

4. Although, as discussed by the Governor’s Commission, there will not be immediate fiscal results from this proposal, “[i]t is a long-term investment by the State in both the economic and social well-being of the child.”64 The state could “expect to see a significant savings within four or five years.”65

6. SECURITY DEPOSITS FOR SUPPORT ENFORCEMENT

An effective and mandatory enforcement mechanism is necessary to guarantee that obligor-parents who are self-employed, or otherwise not subject to a wage assignment, meet their child support obligations.

IMPLEMENTATION

Amend California Civil Code section 4701.1 to require mandatory security deposits where obligor-parents not subject to wage assignments are one month in arrears in payment of their child support obligations. (Legislative Proposal #11)

DISCUSSION

Noncompliance with child and spousal support orders has prompted passage of federal and state legislation requiring improved enforcement and collection mechanisms. However, this remedial legislation is, by and large, directed at collecting support from wage-earning obligor-parents.66

Enforcement of child support orders in cases where obligor-parents are self-employed, or otherwise not subject to a wage assignment, continues to be a serious problem in California. Civil Code section 4700 expressly authorizes a court to require a parent to give reasonable

63. Id. at 75.
64. Id.
65. Id.
security in meeting a support obligation; however, “[t]he reluctance courts show in imposing such a remedy is... substantial.”

In 1986, the California Legislature enacted Senate Bill 1751, amending Civil Code section 4701 to require that mandatory wage assignments be imposed in all child support orders entered after January 1, 1987. While obligor-parents earning a salary are now subject to more stringent enforcement requirements, there is no similar treatment of obligor-parents who are self-employed or otherwise not subject to a wage assignment. The Task Force is therefore recommending legislation that would require a mandatory enforcement mechanism in cases where obligor-parents are not subject to a wage assignment pursuant to Section 4701.

The Task Force proposal would require courts to order money or other assets valued at up to two (2) years worth of child support payments placed into a security deposit if the obligor-parent is one month in arrears in his child support payments. If the obligor-parent continues in arrears, the cash or assets in the security deposit would be used to meet the support obligation. If the obligor-parent makes all support payments in a timely manner for two years, the money or assets in the security deposit would be released and returned to the obligor-parent. The Task Force proposal allows the district attorney to pay “reasonable fees” to the trustee of the security deposit fund. One Task Force member (Marvin Chapman) suggested that such “reasonable trustee fees” should not exceed the interest earnings on those funds, but no motion was made on this issue.

The Task Force’s proposed legislation provides a proper balance between the due process rights of the obligor-parent and the child’s right to receive support in a timely manner. The proposed legislation includes clear and detailed provisions regarding the obligor-parent’s rights to notice and accountings. Other provisions provide for payment of reasonable fees to the trustee for the sale and/or disbursal of assets in the security deposit, and exceptions for exempt assets of the obligor-parents.

The Task Force proposal is not extraordinary. At least twenty-nine states have laws authorizing courts, in their discretion, to require security or bonds to secure child support payments. The federal 1984 Child Support Amendments also require states to “enact procedures

which require that an absent parent give security, post a bond, or give some other guarantee to secure payment of overdue support." The Task Force proposal is unique in that it makes the security deposit enforcement mechanism mandatory where the obligor-parent is in arrears, and clearly sets out the procedure to be followed when this enforcement method is employed. The Task Force proposal constitutes the first attempt in the country to address the need for mandatory enforcement mechanisms in cases involving self-employed parents.

7. JOINT CUSTODY AND CHILD SUPPORT

An award of joint custody should not reduce or lower child support awards pursuant to state or county support guidelines.

IMPLEMENTATION

Amend California Civil Code section 4727 to prohibit reduction of a child support obligation based upon an award of joint physical custody or "shared physical custody." The Task Force recommends that California Civil Code section 4727 be amended to require that (Legislative Proposal #12):

(1) An award of joint custody shall not diminish the responsibility of each parent to provide for the support of the child in accordance with the Agnos Child Support Standards Act; and

(2) Where joint physical custody is awarded, the child support formula established pursuant to the Agnos Child Support Standards Act or county guidelines shall be applied without consideration or reduction for the amount of time the child is to spend with the obligor-parent; and

(3) That the Judicial Council and local counties shall adjust their child support guidelines to preclude reduction based upon the amount of time a child is to spend with the obligor-parent or the type of custody arrangement ordered.

FINDINGS

Current child support law provides an incentive to bargain over custody of the child by directly linking the amount of child support to

the type of custody arrangement. California Civil Code section 4727 permits the court to reduce the mandatory minimum child support award where the obligor-parent is awarded 30 percent or more custodial or visitation time with the child. The Judicial Council’s discretionary guideline expressly includes the amount of time the child spends with each parent as a factor in the support formula. These laws treat the parents’ homes as “hotels,” allotting support based on the number of nights the child sleeps in each.

The Task Force was concerned about the negative economic consequences of section 4727 on women and children, and the use of joint custody for the purpose of lowering child support obligations. Section 4727 may also adversely affect the state’s ability to obtain reimbursement for AFDC expenditures from an obligor-parent. Currently, section 4727 expressly excludes reduction of support in a joint custody arrangement “when a child or children are receiving an AFDC grant.” However, the constitutionality of this provision is now being challenged on equal protection grounds in State of Washington Dept. of Social and Health Services v. Cobb. Should this challenge

70. Cal. Rules of Court, Division VI, §§ 2(a), 5.

71. Attorneys, mediators, and judges have noted the use of joint custody, or threats to contest custody, as a bargaining weapon to lower support obligations or obtain other financial concessions. See Public Hearing Record, Joint Hearing of the Senate Judiciary Committee and the Senate Task Force on Family Equity (Oct. 16, 1986) (Testimony of Hugh McIssac, Director of Family Court Services, Los Angeles Superior Court, regarding joint custody requests to lower child support); L. Weitzman, supra note 1, at 310-18 (regarding one-third of mothers reporting that their husbands had used the threat of a custody contest as “a ploy in negotiations”); Neely, The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed, 3 Yale L. & Pol'y Rev. 168 (1984); Foster & Freed, Law and the Family: Politics of the Divorce Process--Bargaining Leverage, Unfair Edge, 196 N.Y.L. Sch. L. Rev. 6 (1984); Chambers, Rethinking the Substantive Rules for Child Custody Disputes in Divorce, 83 Mich. L. Rev. 477, 567 (1985) (footnotes omitted), noting that:

[a] parent who is not really interested in having joint custody may use the threat of demanding it as a tool to induce the other parent to make concessions on issues of property division and child support. If there were good reasons to believe that imposed joint custody would work well for children, this impact on the negotiating process would be worth the risk. Because there are not, the risk is worth avoiding.

See also Massachusetts Governor’s Commission on the Unmet Legal Needs of Children, Report of the Subcommittee on Divorce and Custody, (1986), finding that whenever the [joint custody] statute is erroneously treated as a presumption, joint custody gives a bargaining advantage to a parent who may not otherwise be a candidate for custody. Often, the more appropriate parent, aware of the deficiencies of the other adult, will bargain away needed financial assets or income in order to get an agreement for sole custody. Conversely, some parents further manipulate the system by seeking joint custody in the hopes of paying less child support.
succeed and section 4727's AFDC exception be held unconstitutional, obligor-parents will be able to limit or lower their AFDC reimbursement liability to the state by obtaining joint custody orders.

Custodial mothers and children typically have a lower standard of living than obligor-parents. Allowing support awards to be decreased solely because of custody or visitation arrangements can lead to further disparities in standards of living between the parents' households. This, in turn, undermines the premise of support guidelines in the first place; to wit, improving the adequacy and equity of child support awards.

Moreover, when custody and support are tied to the amount of support awarded, the focus may shift from what is best for the child to what is least expensive for the obligor-parent. Civil Code section 4727, by allowing for decreased support with increased visitation or joint custody, provides financial incentives for the obligor-parent to seek joint custody in order to lower his support obligation. Similarly, this statute creates disincentives for the lower-income parent (usually the mother) to agree to increased visitation or joint custody. Instead of focusing on what would be the best custody arrangement for the child emotionally, the lower income parent may be forced to base the custody decision on what will be best for the child economically — e.g., sole custody because it will increase the support award.

One study has revealed a clear relationship between joint custody awards and the absence of, or reduction in, child support awards:

Virtually all (93 percent) women with sole custody were also awarded child support. Among those whose custody agreements call for joint legal custody but maternal residential custody, the incidence of a child support award was nearly as high (86 percent). In instances of joint residential custody, however, the percentage receiving support stands at only 38 percent with another 9 percent of cases calling for support a portion of the year.72

The researchers noted that in those joint residential custody cases where no support was ordered, the annual earnings of the two parents were equal at the time of separation.73 However, the children actually were not living equal time in the two households. Instead, the children

73. Id. at 52.
were living with one parent more than two thirds of the time, yet that parent was receiving no support at all. 74

On the issue of amount of support, the study revealed even more reason for concern:

In cases of joint residential custody when there was a support order, the amount of visitation averaged only 23 weekdays and 58 overnights. Although this amount of contact with the other parent would not be an unusual amount of visitation in a sole custody/visitation agreement, the support payment for those with joint residential custody who were ordered to pay any support averaged 14 percent of net income, while the fathers whose wives had sole custody were ordered to pay an average of 26 percent of their net income. This finding confirms the fears of those who believe that joint custody is being used to inappropriately reduce support awards. 75

**Joint Custody More Expensive**

Section 4727 ignores the fact that joint custody is more expensive than sole custody. Economists have found that joint physical custody is a more expensive arrangement than sole custody. 76 Both parents bear increased expenditures as they strive to maintain two complete households and arrange transportation between them. The effect of decreasing support in joint custody arrangements can be to increase the disparities in the two households' standard of living.

Furthermore, allowing a reduction of support to the lower-income parent does not take into account the fact that the “base award” (i.e., the mandatory minimum child support award or applicable county guidelines) is based on a “sole custody” household and does not account for the increased overall expenses of raising a child in two households. 77 Thus, the effect of section 4727 is to decrease an award that is already on its face insufficient for a joint custody arrangement.

Section 4727 may imply that the obligor-parent, by spending 30 percent or more time with the child, is taking on a greater share of direct costs of raising the child, and that this reduces the other parent’s

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74. Id. See also POLIKOFF, Custody and Visitation: Their Relationship to Establishing and Enforcing Support, II IMPROVING CHILD SUPPORT PRACTICE III-131-32.

75. POLIKOFF, supra note 74, at III-132.

76. See Patterson, The Added Cost of Sharing Lives: Don’t Let The Extra Expense of Joint Custody Come As A Surprise To Your Client, 4 FAMILY ADVOCATE 10 (1982).

childrearing costs. However, there is no economic evidence that a parent who has the child 30 percent of the time instead of 20 percent (or 29 percent) bears such increased costs to the extent that his support obligation should be decreased:

For example, visitation of 30%, which means 109 overnights, includes 36 more overnights than visitation of 20%, which includes 73 overnights. A parent who did not rent a larger apartment when he had the child for 73 overnights during the year is unlikely to rent a larger apartment solely because he has the child 36 more overnights. Similarly, the 36 extra overnights do not necessarily lead to increased costs in such items as clothing, medical insurance and care, transportation, etc.

The only sure increased cost will be for food— which is only 18.8 to 22.5% of the total expenditures on a child in a given year. Therefore, the noncustodial parent who has 5 additional weeks of visitation during which time he pays for the child's food costs is assuming an additional 20% (approximately) of the expenditures associated with raising that child for that 5 weeks — or 2% of the total expenditures on the child over the course of the year. Yet under the proportional decrease scheme... the noncustodial parent's proportional share of the child support may be reduced by a percentage much larger than 2% merely because the visitation was increased by 10%.

The direct costs to the parent who has been awarded child support, based on need, do not decrease because the child is sleeping elsewhere. He or she will have to continue paying rent and utilities on the same home even during those periods when the child is not there. Similarly, health insurance, auto loans, medical and dental payments, and costs of clothing and household goods continue regardless of where the child is sleeping on a given night.

Decreased Support Detrimental

78. Section 4727 may imply that the obligor-parent, by spending more time with the child, is entitled to credit for his nonmonetary childrearing efforts. However, if this is the underlying theory of Section 4727, it discriminates against the parent receiving support (usually the mother). Under the Judicial Council support guidelines and Section 4722, the custodial parent's income is included as a component in the formula. Credit is not explicitly given for that parent's nonmonetary childrearing contributions.


80. Bruch, supra note 77.
Decreased support in joint custody arrangements is likely to be detrimental to children's emotional well-being. Studies show that children of divorce are adversely affected by seeing their parents in two households with disparate standards of living. The children feel anger and deprivation, and the economic disparities serve to exacerbate intrafamily tensions arising from the divorce. In joint physical custody arrangements where the child is moving between two households of disparate standards of living frequently, the child's anger and resentment increases:

Where the former husband continued to live fairly well economically and the mother and children faced poverty or a significantly lower standard of living, the mother and children were likely to be angry and depressed for many years and to remain preoccupied with this discrepancy in living standard.81

Joint custody should imply equal sharing of resources, as well as children, on a continuing basis. In fact, the Task Force received public testimony that the most appropriate child support standard in joint physical custody arrangements is "equalizing" the standard of living between the two households.82

Section 4727 discourages a focus on the best interest of the child and can serve to further decrease the standard of living of the mother and child. The problems faced by the child who must accommodate two separate households of disparate standards of living are further exacerbated. The Task Force proposal would eliminate any reduction or adjustment of child support awards when joint physical custody is awarded. It would require strict application of the state or county support guidelines without regard to the amount of time the child spends with the obligor-parent.

OTHER RECOMMENDATIONS

8. ELIMINATE DEFENSES FOR FAILURE TO OBEY A COURT ORDER

Eliminate the defenses of waiver and estoppel in enforcement of child support.


82. See Public Hearing Record, supra note 71 (Testimony of Hugh McIsaac, Director of Family Court Services, Los Angeles County Superior Court).
IMPLEMENTATION

Legislation should be enacted to eliminate the defenses of waiver and estoppel in enforcement of support, and to expressly state that collection of support at less than the full amount due does not waive or estop later collection of the remaining sum due.

DISCUSSION

In 1985, the Governor’s Commission on Child Support and Development and Enforcement recommended elimination of the defenses of waiver and estoppel. The Task Force endorses the Commission’s recommendation. California law states that support orders are “irrevocable as to accrued installments.” However, there is a tendency of some courts to not require actual payment by the obligor parent of past due support based on (1) a showing of some form of an implied waiver by the parties, or (2) estoppel because of a party’s failure to enforce sooner.

Waiver and estoppel defenses reward non-paying parents and penalize custodial parents and children. For example, an obligor-parent is encouraged to disappear and not pay support in order to later raise the defense of estoppel. The custodial parent, who is not receiving support and, therefore, may be unable to afford the costs of locating the obligor in order to enforce the support order, is penalized for supporting the children herself. In addition, battered women often do not pursue support enforcement for several years because they are afraid of jeopardizing their safety and that of their children. Estoppel doctrines potentially reward a parent who can intimidate the other parent into delaying enforcement of support orders. The use of waiver or estoppel as defenses discourages enforcement of support orders and could also affect interstate enforceability of California support orders. (One Task Force member, Marvin Chapman, dissented from the majority opinion on this proposal.)

83. CALIFORNIA COMMISSION ON CHILD SUPPORT DEVELOPMENT AND ENFORCEMENT, supra note 57, at 18-19.
84. Id. at 18.
85. Id.
86. See, e.g., Friedman v. Exel, 116 A.D.2d 433, 501 N.Y.S.2d 831 (New York court holds that battered mother’s failure to enforce child support order for 12 years may constitute waiver).
9. RE-EXAMINATION/UPDATE OF CHILD SUPPORT GUIDELINES

California's child support guidelines, which are intended to reflect the costs of raising children, need to be reevaluated in light of new economic data.

IMPLEMENTATION

The Legislature should establish a commission or task force, which includes economists and researchers, to examine the costs of raising children in California based on new economic data.

DISCUSSION

California's child support guidelines were based, in part, on the costs of raising children as developed by economist Thomas Espenshade. However, Espenshade's economic data have come under criticism in the last year for seriously undervaluing the costs of raising children. In fact, the federal Office of Child Support Enforcement is preparing to distribute materials that detail some flaws and miscalculations upon which guidelines were based. Some of the weaknesses in Espenshade's data and calculations include:

- His data was based on the percentage of parental income spent on children in two-parent intact families. Thus, his calculations did not consider the higher costs of raising children in single-parent households. Total family expenses after separation are higher than those for a two-parent family living in one household. In other words, the percentage of family income that goes towards raising children is higher in a two-household, separated family than in a

90. Williams, supra note 53, at I-6 to I-7; S. Goldfarb, supra note 88, at 8.
91. S. Goldfarb, supra note 88, at 8; Bruch, supra note 77.
two-parent, one-household family. However, California’s guidelines are based on the lower, “two-parent one-household” percentage.

- Espenshade’s percentages of expenditures on children were based on the government Consumer Expenditure Survey for 1972-1973, updated to 1981 price levels. The 1982-83 Consumer Expenditure Survey is now available and provides more recent, accurate data on expenditures on children.

- Espenshade’s calculations were based on a “marginal cost approach theory”. That is, Espenshade determined the extent to which the expenses of two adults with a certain number of children exceeded the expenses of two adults with no children. This “marginal cost approach” places a lower estimate on expenses for children than would be the case if the family’s expenses were divided equally among the total number of family members. In addition, the “marginal cost approach” assumes that when two adults have children, the adults continue to spend the same on themselves as when they had no children, and that the cost of raising children is merely the additional expenses they incur after meeting their original “two adult” expenses without children.

These are only some of the criticisms of Espenshade’s research and calculations. Thus, California’s guidelines should be reevaluated in light of this new research and data.

10. MONITOR SUPPORT GUIDELINES

Child support awards made pursuant to The Agnos Child Support Standards Act of 1984 need to be monitored.

IMPLEMENTATION

The Judicial Council should institute, as soon as possible, a monitoring system to determine how counties are implementing the

92. Bruch, supra note 77, at 59-60.
93. Williams, supra note 53; S. Goldfarb, supra note 88, at 8.
94. Id. at 1-6; S. Goldfarb, supra note 88, at 8-9.
95. Id.
96. See, e.g., S. Goldfarb, supra note 88, at 7-9; Essentials of Child Support Guidelines Development, supra note 89.
Agnos Child Support Standards Act of 1984, and whether this law is resulting in adequate child support awards.

FINDINGS

Some important goals of the Agnos Act (Ch. 1605/1984) were to enhance uniformity in awards and to increase the amount of child support awarded. A number of persons, especially district attorneys representing AFDC recipients, have given anecdotal evidence of improvement in the level of awards under the Agnos Act. However, some attorneys and custodial parents claim that the Agnos Act is being misinterpreted by courts.

The Task Force received complaints from attorneys and parents that some courts are interpreting the “mandatory minimum child support award” pursuant to Sections 4722(a) and 4723 [AFDC grant level] as a cap or “ceiling” on child support awards. Also, it was indicated that judges have refused to apply the discretionary guidelines developed by the Judicial Council or counties.

The Task Force did not have the resources or time to determine the prevalence of misinterpretation and misapplication of the Agnos Act. However, if the Act is being interpreted as a “ceiling,” rather than a “floor,” for child support awards, the result will be institutionalization of child support awards at the poverty level. Therefore, the Task Force recommends that the Judicial Council regularly collect data and monitor the adequacy of child support awards.

11. SUPPORT AND VISITATION

The duty of support should not be affected by the rights of custody or visitation. Child support and parental rights of custody and visitation must remain separate issues.

IMPLEMENTATION

Oppose legislation that would permit issues of visitation or custody to be joined to, coordinated with, or raised in a cross-complaint in a child support action.

DISCUSSION

Permitting custody or visitation issues to be raised in a support proceeding undermines national and state public policy to encourage strict enforcement of child support. Cross-complaints for custody or visitation denial have been used to successfully intimidate or discourage custodial parents from pursuing modifications or enforcement of support orders. California Civil Code section 4382 recognizes that child custody and parental rights of visitation and custody are clearly separate issues. The Task Force, therefore, recommends that no legislation be enacted that would undermine section 4382 or link custody/visitation and support issues.

12. STATEWIDE LIEN SYSTEM

Establish a central state agency for the recording of child support judgments as liens against obligor-parents' real property owned throughout the state, and require that all child support judgments be automatically filed with this agency.

IMPLEMENTATION

In order to enhance the ability of parents and district attorneys to enforce child support, a more expeditious system must be instituted to allow liens to be established across county lines. In the FY 1987-88 state budget the Governor has proposed to establish a computerized, statewide lien program. Also, Assemblyman Tom Bates has introduced legislation (AB 2025) to implement such a system.

DISCUSSION

This recommendation was adopted by the Governor's Commission on Child Support Development and Enforcement. The Task Force endorses the Commission's Recommendation and findings.

A statewide central recording and lien system would create an efficient and effective technique for enforcing child support obligations. Currently, a judgment must be separately filed in each county where the obligor owns real property. Thus, to assure that all of an obligor-parent's property is subject to a lien, the child support order would have

98. See KASTNER & YOUNG, supra note 68, at 52-54.
99. CALIFORNIA COMMISSION ON CHILD SUPPORT DEVELOPMENT AND ENFORCEMENT, supra note 57, at 47-54.
to be recorded in 58 counties. By establishing a central state agency, a judgment would only have to be filed in one place to establish a lien on all of the real property owned by the obligor throughout the state.